1965

Bernice Culley v. Garfield Smeltermen's Credit Union et al : Brief of Appellant in Support of Petition for Rehearing

Utah Supreme Court

Roy F. Tygesen; Attorney for Plaintiff and Appellant;
Mark S. Miner; Attorney for Plaintiff and Respondent;

IN THE SUPREME COURT of the STATE OF UTAH

BERNICE CULLEY, Executrix of the Estate of VIRGIL J. CULLEY, deceased,

Plaintiff and Respondent,

vs.

GARFIELD SMELTERMEN'S CREDIT UNION; S. L. LESTER, President; GLEN M. JONES, Vice-President; AL ROBINSON, Treasurer,

Defendants,

vs.

DOUGLAS K. CULLEY,

Interpleading Plaintiff and Appellant,

No. 10247

APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REHEARING

Appeal from judgment in favor of Plaintiff, holding that a joint account in credit union belonged to deceased estate, and not to surviving joint tenant. Judgment entered after trial without jury, before the Honorable A. H. Ellett, at Salt Lake City, Utah, in Third Judicial District Court, September 8, 1964.

A. H. ELLETT, *Judge*

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(Case dismissed as to Defendants in lower court)

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PETITION FOR REHEARING

Comes now the above named DOUGLAS K. CULLEY, Appellant and inter-Pleading Plaintiff, and Petitions the Court for a rehearing in the above entitled matter, and in support thereof, represents that this Court erred, in the following:

1. The lower Court held that (A) "That at no time did Virgil J. Culley (Deceased) intend that Douglas Culley was to have said account or any part thereof during the life time of Virgil J. Culley and that Virgil J. Culley never intended to make a gift of the money

during his life time to Douglas K. Culley, the inter-Pleading Plaintiff"; That there was no joint tenancy intended and no joint tenancy created by reason of the joint share agreement; (B) The joint share agreement was signed as a substitute for a will.

In its conclusions of law, the lower Court held that the joint share agreement was a testamentary device and as such violates the statutes of wills.

This Court confirms those findings, and that it was a testamentary disposition.

Since every joint account provides for survivorship, then under this Courts decision, every joint account is void.

2. The principal that a presumption exists in favor of the validity of the joint share agreement, that can be overcome only by clear and convincing evidence, is entirely abandoned under the present decision.

3. The Court points out that the failure of appellant to exercise control over the account in the lifetime of his father, nor to withdraw or deposit to the Account, is the type of proof necessary to support that Findings of the lower Court that the joint share agreement is void. This reverses former rulings of this Court, wherein this Court held that a withdrawal was an indication of the opposite intent.

4. This decision in effects hold (A) where no control is exercised; (B) Where surviving joint owner had no intent to control the account in the lifetime of depositor; (C) there was no intent on the part of depositor

to create a joint account, by reason of the conduct of survivor. In other words, the conduct of survivor. In other words, the conduct of survivor determines the intent of depositor.

5. The foregoing facts apply to practically every such account, and would make every joint account vunerable to attack.

6. The present decision in effects voids the joint account practice used in business over a long period of time.

7. This decision opens the field to voluminous litigations and probate proceedings.

Respectfully submitted August 16, 1965.

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I certify thata a true and correct copy of the foregoing was mailed to MARK S. MINER, Attorney at Law, 816 Newhouse Building, Salt Lake City, Utah, August 16, 1965.

Roy F. Tygesen

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DISPOSITION MADE IN LOWER COURT AND BY THIS COURT ON APPEAL.

Appellant's original brief set out disposition in lower Court, and this Court affirmed; This petition for rehearing by Douglas K. Culley, Appellant follows.

STATEMENT OF MATERIAL FACTS

This matter involves the deceased father, VIRGIL J. CULLEY; BERNICE CULLEY; the surviving wife

and Executrix of his Estate, Plaintiff and Respondent herein; THE GARFIELD SMELTERMEN'S CREDIT UNION, defendant in the action; and DOUGLAS K. CULLEY, surviving joint owner of the account, the Interpleading Plaintiff, Appellant, and petitioner for rehearing. For the sake of brevity, VIRGIL J. CULLEY, will be referred to as "the Father"; BERNICE CULLEY, as "Stepmother" and the GARFIELD SMELTERMEN'S CREDIT UNION, as "Credit Union"; and DOUGLAS K. CULLEY as "the son."

In 1960, the father, was a widower, his wife having died, leaving four sons and a daughter, all of whom were minors, except Douglas, the oldest son, who was married and maintained his own home in Magna, Utah.

At the time the account was created, the three brothers lived with him, and the sister lived with her maternal grandparents. The father lived separate and apart from the family, and contributed practically nothing to their support.

The joint account was set up March 10, 1960. At the time, and up to his death, the father was employed by the Smelter as foreman, and had been a member of the Credit Union for years.

The father had an account with the credit union. He obtained from the credit union their form entitled "JOINT SHARE ACCOUNT AGREEMENT," went to the home of the son, both signed the agreement, and the father delivered the agreement to the Credit Union,

where it remained unchanged, until deposited with the Court.

The agreement was in usual form, prepared by the Credit Union, providing (1) joint ownership with right of survivorship, (2) right of either party to deposit or withdraw, (3) and giving the Credit Union the right, with immunity from claim, to pay to either joint owner or the survivor.

The father remarried, Bernice Culley, some two years prior to his death, October 10, 1963.

On September 21, 1963, the father made a will, less than a month before his death, giving his entire estate to the step mother, and specifically giving his children nothing. The Will made no mention of the saving account with the Credit Union.

There were no children issue of the second marriage.

Under the lower Court decision, the savings account was awarded to the estate, and of course under the Will, would go to the stepmother.

From the time of setting up the joint account till shortly before his death, the father made deposits and withdrawals from the savings account.

Douglas K. Culley, the son, never made a deposit or withdrawal, and in no way exercised control of the account.

The father repeatedly discussed the account with the son, and on one occasion said, He (the son) was to

see that the boys were provided and taken care of" (Respondents brief page 5-6-7).

The step-mother stated that the father repeatedly promised her he would change the account, and made a trip to the Smelter to do so.

He never changed the account.

After the fathers death, the step-mother instituted probate proceedings and instituted this action, as Executrix of his estate.

The Credit Union deposited the savings account into Court, together with copies of their records.

There were extended pleading, motions, and orders, but finally the Court made his "Findings of Fact" that there was no joint tenancy, there was no intent to create a joint tenancy, and the joint share agreement was signed and made for the sole purpose of being used as a substitute for a will.

Further, under the undisputed testimony of Douglas K. Culley, the joint share agreement violates the statute of wills, and was an attempted testamentary devise.

In its conclusions, the Court ruled that the joint share agreement was an attempted testamentary devise and as such violates the statute of wills.

The Conclusions makes no reference as to the question of "intent," [The decree awarded the $1,540.14, deposited with the Court, to be paid over to the Executrix,

together with the title to a pontiac automobile and a trailer.]

This appeal followed, and this Court affirmed the lower Court.

[The foregoing facts are undisputed.

The lower Court, and this Court based its decision entirely on the testimony of the son.

There was no evidence of fraud, mistake, undue influence; nor was there any evidence presented of inequitable conduct on the part of the son.

This Court in its opinion stated: "It is to be kept in mind that if the transfer of ownership of this account, if any there was, was intended to vest only upon the father's death, that would be an attempted testamentary disposition, which did not conform to the requisites for a will, and would therefor be invalid to transfer ownership as the trial Court ruled.

The Court quotes from Judge Cordozo quoting from a former decision. The Court failed to add further statement of Cordozo, that "This presumption, injected by Courts of equity since ancient times, continues and can be overcome by the intervener only by clear and convincing proof to the contrary" (Tangren case — page 181). The Court then said "The critical question confronted here is whether the trial Court's finding that the parties did not intend the son Douglas to own any interest in the account prior to the father's death is supported by that degree of proof."]

[To sustain this findings of the lower Court, this Court recites (1) The father established the account, (2) made all deposits and withdrawals, (3) Douglas the son, made no deposits or withdrawals, (4) The son makes no claim that his money went into the account, (5) After quoting from the son's testimony, this Court concluded the foregoing was sufficient to overcome presumption of validity of written agreement, by clear and convincing proof. And finally the Court said they must favor the lower Courts findings, and proceeded to affirm.

In support of our petition for rehearing, these points should be reconsidered:

1. What proof is required to constitute "CLEAR AND CONVINCING PROOF," sufficient to void a written instrument?

2. Is the intent of donee, under joint share agreement, alone, sufficient to determine the intent of Donor, assuming no inequitable conduct on the part of donee?

3. Does the provision for survivorship, coupled with the fact that donee did not, and had no intention of using the account, during Donor's lifetime, violate the statute of wills, and void the joint share agreement?

4. Is there a responsibility on this Court, where facts are undisputed, to make its own "findings of fact" pointing out the basis for the same.

5. This decision goes in direct conflict with long established business practice, and in conflict wth legis-

lative directive (7-13-39) that the opening of an account, as outlined, shall be "CONCLUSIVE."

6. Practically every credit union account comes within the province of this case, and opens the door to litigation.

POINT ONE

WHAT PROOF IS REQUIRED TO CONSTITUTE "CLEAR AND CONVINCING PROOF," SUFFICIENT TO VOID A WRITTEN INSTRUMENT?

The definitions we have found of this type of proof, were not too helpful, and so, we propose a review of some of the joint account cases, decided by this Court, in an attempt to see what constituted CLEAR AND CONVINCING PROOF.

HOLT VS. BAYLESS, 85 Utah 364, 39 Pacific Second 715. Decided December 28, 1934.

In this case, donor made all deposits, donee made no withdrawals or deposits, donee said "It was Aunt Emma's money" and donee thought she was to get money when "Aunt Emma died." There was a subsequent will by donor, with no mention of account. Till the Tangren case, this was considered the law.

The donee did not exercise control, nor did she intend to until after death of donor.

The facts are identical with our case, but the Court said the evidence did not meet the requirement of clear and convincing proof.

The trust agreement was sustained. Under our case, it would have been reversed.

The intent of donee, nor the question of testamentary disposition, was not discussed.

Lawyers, basing their advice on that decision would have been on reasonably safe ground, in advising joint savings account, in lieu of wills.

The Court made extensive report of facts, and the reason for its findings.

WOOD VS. KINTNER, 86 Utah 279, 43 Pacific Second 192. Decided April 5, 1935.

In this case, fraud was claimed. The donor created the account, furnished all they money, the donee was a friend, not a relative, she deposited nothing, withdrew nothing, exercised no control.

The Court, after extensive review of the facts, found the burden was not met, and approved the joint account in survivor. This case likewise would have come into the preview of our case and been reversed.

NEIL VS. ROYCE, 101 Utah 181, 120 Pacific Second 327. Decided December 29, 1941.

Here both parties were alive. The money belonged to husband. Wife made no deposits. Husband gave wife account book, and she said, "I won't touch it." Claim was that the account was set up to avoid probate. This is the nearest the Court previously considered an attempted testamentary disposition, but did not consider it in that light, as effecting their decision.

In discussing "clear and sufficient proof" the Court at page 331, said, "The only evidence refuting the im-

plied joint savings account in the instant case was that of the testimony of the co-depositors to the effect that their purpose in establishing the joint savings account was to take advantage of the survivorship provision, and that the money was intended to be the sole and separate property of the intervenor. Such proof under the circumstances of this case cannot be termed so clear and convincing as to require the trial court to find in favor of appellant. To say that it was sufficient would throw open the door to fraud and colusion as between co-depositors and third parties. This equity will not do."

Here, both parties to the trust account said it was the property of husband, that the wife did not intend to touch it, and that it was made only for the purpose of avoiding probate.

Under our case, this one would have been reversed both as to intent, and by reason by an attempted testamentary disposition. The written agreement was sustained.

GREENER VS. GREENER, 116 Utah 571, 212 Pacific Second 194. Decided December 2, 1949.

In this case the money belonged to husband. They made a tour of savings account institutions, and changed the accounts to both their names. They separated and then effected a reconciliation. Again they signed joint account cards. The husband withdrew 20,000.00 and put it in his sons name. She then sued for divorce and claimed half of these joint accounts.

Here the Court sustained the lower Court in its findings there was no intent to create a joint account, and here was a very substantial reason, he withdrew all the money and closed the account.

Had the father done so in our case, this case would never have been instituted.

The fact that the father did not withdraw the money, nor change the account card, would be an indication or evidence of his intent in setting up the account.

The lower Court held that there was clear and convincing proof against presumption of joint tenancy, and that the account was created to avoid probate. The lower Court made an extensive memorandum to support these findings. This Court spent ten pages reviewing the evidence and the findings and memorandum of the lower Court, before agreeing there was clear and convincing evidence to set aside the written documents. They did not include as their reason that it was an attempted testamentary disposition.

This case indicates the care taken to review the facts before holding a written agreement would be set aside.

The striking point in this case is that the husband withdrew all the money in his lifetime. A pretty strong indication of his intent.

FIRST SECURITY BANK OF UTAH, as EXECUTOR VS. DEMIRIS, 10 Utah Second 405, 354 Pacific Second 97. Decided July 7, 1960.

In this case, the monies were property of husband. He had purchased bonds in the name of him and wife, and opened savings accounts in his name and that of his wife. These were of long standing. They had been married 31 years but estranged over the last fifteen years. Husband was ill with cancer, and a month and one half before his death, he changed his own account by adding the wife's name. She immediately withdrew the money in all the accounts and put it in her name. The husband made a will giving his brothers a substantial share of his estate. The lower Court ruled the bonds and the long standing joint accounts went to the wife, because of the time element. The recent account did not, because that was not his intent. This Court supported that decision, indicating that the account was set up for convenience because of illness, and her immediate withdrawal indicated her intent when she signed the card.

There was pretty strong evidence as to both of their intentions in setting up the last account. It is interesting to note, that they did not similarly rule as to the old accounts and the bonds.

Judge Crockett, at page 99, said in relation to the wife, withdrawing the account." Looking at the matter through the eyes of equity it seems undisputable that Defendant's act of grabbing the money at the earliest opportunity was for the purpose of getting it for herself and excluding the cotenant therefrom; and that this was a wrongful act which should not be rewarded."

I insert the above as an indication of the Courts position, before overturning the joint account.

Even then, the Court did not change the written instrument so far as the old accounts and bonds were concerned.

In our case, the son exercised no control and made no withdrawals, which indicated his intent as to the account: In the Demiris case, the withdrawal indicated her intent not to create a joint account.

Would Ellett's ruling had been different if the son had exercised control, and drawn out all the money in the account?

O. A. TANGREN VS. ADALINE M. INGALLS,
12 Utah Second 388, 367 Pacific Second 179.
Decided November 30, 1961.

This case of course set up the proposition that the intent in creating the account, was controlling.

It does not pinpoint whose intent, Donor, or donee, but it did require donor, who desired to set aside written instrument, to show his intent by clear and convincing proof.

Donor had two building and loan accounts in his own name. Ten months prior to his death, he included Donee's name on accounts. During his lifetime he instituted suit to have accounts declared his own, but died five days after suit filed, and his Executor took over, claiming (1) Money all Donor's, (2) Donee contributed nothing to the account, (3) Donor was not indebted to

Donee; (4) Donor later gave Donee $4,000.00 as her share of his estate, (5) Donor was not aware of what he was doing in signing the joint account card.

Judge Faux ruled in lower Court by way of summary judgment, that the joint account should stand.

This Court said Donor should have had the opportunity to present evidence in support of the above points, and by inference indicated that if clear and convincing proof were given, the written agreement could be voided.

A major factor in his case, going to show intent of donor was the giving of $4,000.00 as Donee's share of his estate.

Another major point was that in his lifetime, Donor filed suit to set aside account.

Neither of these points are present in our case.

BRAEGGER VS. LOVELAND, 12 Utah Second 384, 367 Pacific Second 177. Decided December 1, 1961.

Donor was a bachelor, seventy years of age and suffering from cancer. He had a bank account of $45,000.00. Two months before his death he put his sisters name on the account. Before his death she withdrew the money and put it in her own account. His Administrator claimed the account. The lower Court gave each one-half.

This Court sustained the validity of the account, saying her withdrawal of the account during donor's lifetime was practically the only fact the Administrator

could point to, to upset the joint account. This Court said this was not enough.

The Court did review the evidence and make its own findings.

This case does hold that a withdrawal by one joint tenant does not automatically destroy the joint tenancy. Does the fact that Donee neither exercised control, nor intended to, constitute clear and convincing evidence sufficient to set aside the written instrument?

This case is strong authority for the proposition, that "The burden was not upon the Defendant to make an affirmative showing of such intent. As the survivor she was presumed to be the owner and the burden of attacking her ownership was upon the Plaintiff Administrator."

In support of its own "findings" the Court points out, affection between brother and sister, her care of deceased, and his expression to another, the account would go to the Donee.

All these elements are present in our case, father and son relationship, the son caring for father's children, the father expressing his desire that "the boys be taken care of."

HAYWARD VS. GILL, 16 Utah Second 299, 400 Pacific Second 16. Decided March 18, 1965.

In this case a daughter moved in and cared for her father when he was 82 years of age. He died five years later. He went to lawyer and had dee drawn in favor of

daughter, reserving life estate, and placed daughters name on 1,350.00 account.

His estate claimed the account and attempted to void the deed.

She never contributed to the account, exercised no control, the father in five year period never changed the account or expressed dissatisfaction.

Judge Hanson dismissed Plaintiffs complaint. This Court after reviewing the evidence confirmed this action.

The Court said that the fact the daughter did not contribute "any money in this account is not of controlling significance." Here again the Court said the Plaintiff had the burden of proof. There was no mention of Donee's intent.

There was nothing said about an attempted testamentary disposition. Here again the Court made its own findings.

Similarity to our case, are father and son relation, the son caring for minor children, no dissatisfaction or change in the account in three years, no deposits, withdrawal or control by donee.

Under Judge Elletts ruling, this case would have been decided in favor of the estate.

From the foregoing review of cases, this summary seems fair; In six of these eight cases, the Court sustained the written instrument.

In the Demiris case the Court sustained the agreement as to the old accounts.

In the Demiris case the Court found the joint account would not stand up as to the new account because of illness of Donor, her intention indicated by immediate withdrawal of the account, and the conduct of donee being inequitable.

The Court did support the agreement as to the old accounts.

The Greene case was one where the account was not sustained.

The Court pointed out marital difficulties, that he withdrew all the monies in his lifetime.

We submit that none of the elements for voiding the agreement given in the Demiris or Greene case are present in our case. Not one of the foregoing cases went into the question of an attempted testamentary devise.

In each and every case this Court carefully set out its own reasons for its conclusions, and nowhere is there indicated that the lower Court ruling should be given controlling consideration.

POINT TWO

IS THE INTENT OF DONEE ALONE, SUFFICIENT TO DETERMINE THE INTENT OF DONOR, ASSUMING NO INEQUITABLE CONDUCT ON PART OF DONOR?

We point out to the Court that Judge Elletts ruling as to intent is based exclusively on the testimony of

Donee, and the opinion is this case says: "On the basis of Claimant's own testimony it seems incontestable that the trial court could reasonably find as it did, that neither he nor his father intended that he should have an interest in this bank account while his father lived."

There is not one statement in this record from the father himself indicating his negative intent.

We do not dispute the Courts findings that the son had no intention of exercising control during the fathers lifetime.

We do raise this question, can that fact alone, without a single inequitable act on the part of the son, destroy the written contract?

If we get our feet back on the ground, we will face the fact, that a very substantial amount of savings accounts held in joint tenancy, are set up under exactly the facts of this case.

This Court quotes the sons statement to establish the sons intent, and then attributes that to establish the fathers intent.

We contend that since it was the fathers money, it was his acts that created the account, it should be his clear intent that should govern, and the clear edict of the written agreement should be carried out.

The intent of donee should be given weight only when it is accompanied by inequitable conduct on the part of donee, as Judge Crockett pointed out in the Demiris case.

In the Holt vs. Bayless case the Court said "The controlling question is whether THE PERSON OPENING THE ACCOUNT intentionally and intelligently created a condition embracing the essential elements of joint ownership and survivorship."

In the Neil vs. Royce case, when the wife was given the account book, she said "I will never touch the account." She never did. Yet the Court sustained the agreement.

In the Greene case at page 199, the Court said "The most widely accepted view is that the property passes as a gift inter vivos provided there is a donative intent . . ."

In making a gift, does not the intent of donor control?

If A makes a gift to B, who in turns throws it in the garbage can, does than void the gift to B?

The facts in this case to show the fathers intent are that, (1) he picked up the card, (2) he asked the son to sign, (3) he had been a member of the credit union a long time, he could read and write, and presumably knew what he was doing, (4) he delivered the card to the credit union, (5) he never changed the card, (6) his wife asked that he change the card, but he never did, and (7) he said he wanted "the boys provided and taken care of."

Now, the lower Court and this Court says he did not intend what the card said, "The joint owners of this account hereby agree with each other and with said credit

union that all sums now paid on shares, or heretofore or hereafter paid in on shares by any or all of said joint owners to their credit as such joint owners with all accumulations thereon, are and shall be owned by them jointly, with right of survivorship and be subject to the withdrawal or receipt of any of them, and payment to any of them or the survivor or survivors shall be valid . . ."

We submit, the father intended to do exactly what that card said, and the sons intentions as to what he would do with the right so bestowed, should not void that written contract.

POINT THREE

DOES THE PROVISION FOR SURVIVORSHIP, COUPLED WITH THE FACT THAT DONEE DID NOT, AND HAD NO INTENTION TO USE THE ACCOUNT, DURING THE LIFETIME OF DONOR, VIOLATE THE STATUTE OF WILLS, AND VOID THE JOINT SHARE AGREEMENT?

Admittedly this is a new point injected into the already confused status of joint accounts.

None of the cases reviewed above, considered this point, or determined the point.

In the present case Judge Ellett in his "findings" (8) "The Court further finds as a fact that there was no joint tenancy created between Douglas K. Culley and Virgil J. Culley by reason of the joint share agreement and that said joint share agreement was signed and made for the sole purpose of being used as a substitute for a will."

(9) "The Court further finds and the evidence conclusively shows that the joint share agreement was established by Douglas K. Culley and Virgil J. Culley for the sole purpose and with the intention that Douglas K. Culley, as the survivor, should have the remaining balance at the time of Virgil J. Culleys death."

(10) "The Court finds as a fact that the joint share agreement violates the statute of wills and that under the undisputed testimony of Douglas K. Culley the joint share agreement was established by Virgil J. Culley and Douglas K. Culley as a testamentary devise."

The lower Courts conclusions: (1) "That the joint share agreement which was made and entered into by Douglas K. Culley and Virgil J. Culley on March 10, 1960, was an attempted testamentary devise and as such violates the statute of wills."

Incidently, there was not once mentioned in the trial anything about wills. Does the review by this Court show there was clear and convincing evidence as to this "finding"?

The lower Courts conclusions of law are limited to (1) above as to its being an attempted testamentary devise. There are no conclusions as to intent.

The decree is based on these findings and conclusions, and makes no reference to either intent or attempted will.

Does Judge Ellett base his decision exclusively on the findings and conclusions, as to a testamentary devise?

This Court, in approving of Judge Ellets decision said, "It is to be kept in mind that if the transfer of ownership of this account, if any there was, was intended to vest only upon the father's death, that would be an attempted testamentary disposition which did not conform to the requisites for a will, and would therefor be invalid to transfer ownership as the trial Court ruled."

Again, "The critical question confronted here is whether the trial Court's finding that the parties did not intend the son Douglas to own any interest in the account prior to the father's death is supported by that degree of proof."

This Court then quotes from Respondent's brief as to testimony of the son, and based on that excerpt, said, "On the basis of Claimant's own testimony it seems incontestable that the trial Court could reasonably find as it did, that neither he nor his father intended that he should have any interest in this bank account while his father lived."

Every joint account card I have ever read, provides for survivorship. Now we have in this case, the situation of testamentary devise, as an additional factor for the Courts to consider, in arriving at the intent of the creator of the account, so as to determine if the written agreement shall be set aside by clear and convincing evidence.

Every bank, building and loan association and credit union, prepares cards for their depositors with almost identical provisions. They urge, and almost insist that their depositors have another name on the card, to avoid probate, and facilitate payment.

This Courts ruling in this case stands for the proposition, that if the donee, not donor, had no intention to exercise control over the account until death of donor, then the joint share agreement is void.

Does that not end the matter?

What does injecting the question of testamentary disposition into the case, do other than add to the confusion?

7-13-39 U.C.A. 1953 (Supp. 1961) provides, after setting out how the account shall be set up, "The opening of the account IN SUCH FORM shall in the absence of fraud, or undue influence, be CONCLUSIVE EVIDENCE in any action or proceedings to which either the association or the surviving party or parties is a party, of the intention of all the parties to the account to vest to such account and the additions thereto in such survivor or survivors."

Does a decision by Judge Ellett and by this Court determining that the joint share agreement was not drawn "in such form" do away with the intent of the legislature as above set out.

Is the provision of this statute contingent on the joint share agreement being found by the Court to be proper in form?

Assuming the Credit Union had paid over to the son the money in the account, and the Court finds that the agreement was void, is the credit union liable to the estate for paying out on a agreement the Court declared void?

It would seem to Appellant, that inserting the matter of an attempted testamentary disposition, only adds to the confusion presently existing in relation to joint savings accounts.

POINT FOUR

WHERE FACTS ARE DISPUTED, IS THERE A DUTY OF THE PART OF THIS COURT TO MAKE ITS OWN FINDINGS OF FACT?

This Court in its opinion said, "We recognize that from the recital of joint ownership with the right of survivorship there arises a presumption that such is the fact. But it is, of course, not absolute and invunerable to attack. This is true even of deeds and other written instruments."

"On the basis of Claimant's own testimony it seems incontestable that the trial court could REASONABLY find as it did, that neither he nor his father intended that he should have any interest in this bank account while his father lived. AS IN OTHER MATTERS OF PROOF, WHETHER THE EVIDENCE IS SUFFICIENT TO MEET THE NECESSARY REQUIREMENTS OF BEING CLEAR AND CONVINCING IS LARGELY FOR THE TRIAL COURT TO DETERMINE BECAUSE OF HIS ADVANTAGED POSI-

TION. UNDER THE TRADITIONAL RULES OF REVIEW, WHICH REQUIRES US TO SURVEY THE EVIDENCE AND ALL REASONABLE INFERENCES TO BE DRAWN THEREFROM IN THE LIGHT MOST FAVORABLE TO THE TRIAL COURT'S FINDINGS, WE CAN SEE NO BASIS FOR REVERSING THE JUDGMENT."

In our case there is no conflict in the evidence.

In all the cases referred to above this Court in review has extensively reviewed the lower Courts findings as to clear and convincing proof, whether they affirmed or reversed.

There is no basis for the lower Courts findings as to the fathers intent, except the testimony of the son.

There was no pleadings, no evidence, for the lower Courts findings and conclusions as to testamentary disposition.

Should not this Court have made its own determination as to the fathers intent, as indicated by the decision in the Greene case, at page 202, "There are cases in which we may be equally as good a position as the trial court to make the inferences from what are usually called basic, evidenciary, or underlying facts.

For instance where all the evidence is documentary. . . . "Or where there are no issues concerning it in which the creditability of the witness could play a part. . . . We would be in as good a position as the trial Court to make inferences and deductions from the evidence."

Again in the Demiris case at page 99, this Court said, "It is our prerogative and DUTY under the constitution to review the evidence in equity cases and to modify or make new findings if the record compels it."

This is the case where Judge Ellett, sitting as a member of the Court. dissented, and spent substantial time supporting his position at (Page 104) "I am apposed to this Court becoming a trier of facts. It should confine its efforts to a review of the alleged errors of law and to a passing upon facts in equity cases only when it is in the same position as is the district Court judge, viz., when the facts are established by documentary evidence only."

Did this Court lend too much weight to the lower Courts findings, rather than makes its own determination?

In our case the joint agreement is documentary, the exhibits deposited by the credit union are documentary, the will is documentary, the testimony of the son is undisputed, his creditability is certainly not in issue, since he testified to his own disadvantage.

We submit, the Court should start with a clean sheet, and from the record, make its own determination as to "clear ond convincing proof," rather than examining the facts "in a light most favorable to the trial Court's findings."

POINT FIVE
THIS DECISION IS IN DIRECT CONFLICT WITH THE LEGISLATIVE INTENT AS EXPRESSED IN 7-13-39 U.C.A. (Supp. 1961), AND LONG ESTABLISHED BUSINESS PRACTICE.

As heretofore stated, the joint account cards used by banks, building and loan associations, credit unions, and other saving institutions are almost identical, and prepared meticulously by their legal advisers.

Every one of these urge their depositors to add an additional name to their account.

For years I have advised and urged clients to make these joint accounts, with provision for survivorship, make joint tenancy deeds, putting stocks and bonds in joint names, with right of survivorship, and also advising that then no probate is necessary, nor is a will required.

If I interpret the Courts decision correctly, after the death of the donor of the account, if his estate can show that the donee did not intend to exercise control over the account, till after the donors death, the joint account is void, and they money goes to the estate, resulting in probate.

I submit that each member of this Court is fully aware of the business practice of adding a name to an account, with the absolute intention (1) for donor to retain control during life, (2) to provide for the funds being available in emergency or illness; and finally (3) the fund go to donee on death, without the expense of probate.

This I submit is down to earth actual business practice.

This decision puts an end to that practice.

As legal advisor to a savings institution, could he advise the bank to pay to the survivor, on the basis that the statute quoted heretofore would protect the bank.

Would not his advice be more in keeping with this decision if he said "Deposit it with the Court, and let the heirs and survivor, fight it out."

POINT SIX

UNDER THE HOLDING IN THIS CASE, ALMOST EVERY CREDIT UNION ACCOUNT IS VUNERABLE.

Limiting our discussion to the Garfield Smeltermen's Credit Union. There are in excess of one thousand employees at the smelter. A substantial majority of these belong to the credit union. All are urged to take home a card and have a wife, brother, son, daughter, parent, friend or relative sign.

Membership in the credit union by state law and the credit union by-laws limit membership to employees.

Practically every account makes deposits by payroll deduction.

The donor, not the donee makes this arrangement for payroll payment.

The credit union office is inside the gates of the smelter. Only employees have free access. Donees sel-

dom if ever go to the office. Certainly donee makes no deposit to the account.

The donor exclusively controls the account in his lifetime, both as to deposits and withdrawals.

If he wants to eliminate the donee, he simply withdraws all money on deposit, the donee neither signs for withdrawal or is notified.

This gentlemen, is actually what happens in the vast majority of cases.

Douglas K. Culley, the son, testified to the exact nature of his relation to the account.

Practically every other donee, whether wife, brother, sister, or friend, would testify exactly as did Douglas K. Culley.

Under this decision, a substantial majority of the savings accounts in the Garfield Smeltermen's Credit Union, would be in exactly the same position as the account in this case.

I assume this Court is not so gullible as to believe brotherly love would predominate, over the heirs possibly getting a cut of the saving account as such heir.

I think it is a fair conclusion that this ruling will result in a substantial increase in probate proceedings, followed by litigation between the estate, the survivor and the credit union, savings and loan association and banks.

The view expressed by Judge Henriod in the Tangren vs. Ingalls case is almost prophetic, when he said at page 186, "This case has upsidedowned the law on joints accounts. Most certainly it will require banks and depositors to change their ways, to what extent it is difficult to anticipate. This case will bring more than one client into the advocates office to inquire: Why did you tell me that our joint account would eliminate the necessity of making a will, and would save me the costs of probate . . ." That has already been my experience.

For thirty years I have urged my people to make these joint accounts, in lieu of a will and expense of probate.

Lee Cummings was nice enough to send me extra copies of the "green sheet" in this case, which I forwarded to the Culley boys and the treasurer of the smelter credit union.

Based on telephone calls, personal contacts, and overheard comments, this community is much disturbed.

To those who have consulted me since the opinion, I have no answer that satisfies them or me.

If my version of the decision, as set out herein, is in error, then I would be happy and delighted to be so enlightened.

If my version is correct, then this Court should, if it still sustains Judge Ellett, set it out in no uncertain terms.

In shop-talk with other attorneys, their concern is the same as mine herein expressed.

This Court could render a great service to both savings institutions, the legal profession and to depositors, by once and for all clearing the confusion heretofore existing as to savings accounts held jointly, and particularly clarify this last decision.

CONCLUSIONS

1. There is no clear and convincing proof, sufficient to set aside and void the joint share agreement.

2. Absent misconduct on part of donee, his intent in setting up the joint account, is not alone, sufficient to void joint account.

3. The question of attempted testamentary disposition should not be added to matters to be considered in determining intent.

4. Where the evidence is documentary, and no conflict in oral testimony, this Court should makes its own determination of intent and other issues.

5. The use of joint accounts, as done in this case, to avoid probate, is a long established business practice; and which is supported by legislative enactment.

6. This decision will be the basis for increased litigation that involve joint savings accounts.

Respectfully submitted,

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